

# 10-285

*To Be Argued By:*  
BRIAN P. LEAMING

=====

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-285

\_\_\_\_\_

UNITED STATES OF AMERICA,  
*Appellant,*

-vs-

JOSHUA ACOFF,  
*Defendant-Appellee.*

\_\_\_\_\_

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

=====

REPLY BRIEF FOR  
THE UNITED STATES OF AMERICA

=====

DAVID B. FEIN  
*United States Attorney  
District of Connecticut*

BRIAN P. LEAMING  
SANDRA S. GLOVER (*of counsel*)  
*Assistant United States Attorneys*

## TABLE OF CONTENTS

Preliminary Statement .....	1
Summary of Argument.....	2
Argument.....	4
I. The Fair Sentencing Act of 2010 does not apply to cases, such as the defendant's, involving pre-enactment conduct, and therefore, under governing law, the district court was required to impose a sentence of at least 60 months of imprisonment. . .	4
A. The Savings Statute bars application of the Fair Sentencing Act to conduct occurring before its enactment. ....	4
B. The defendant's arguments against application of the Savings Statute are unavailing. ....	13
1. The Fair Sentencing Act altered the penalty structure of 21 U.S.C. § 841(b).....	13
2. Application of the Savings Statute does not frustrate congressional intent. ....	17
3. There are no constitutional concerns with continued application of the pre-existing penalties that would require narrow construction of the Savings Statute.....	22

II. The crack to powder disparity under 21 U.S.C. § 841(b) does not violate principles of equal protection. . . . .	25
III. Acoff waived his right to seek to enforce a sentence outside the agreed upon range. . . . .	29
Conclusion. . . . .	31
Addendum	

## TABLE OF AUTHORITIES

### CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986). . . . .	23
<i>Bradley v. United States</i> , 410 U.S. 605 (1973).. . . .	8, 9
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979).. . . .	18
<i>Davis v. United States</i> , 972 F.2d 227 (8th Cir. 1992). . . . .	14
<i>Dillon v. United States</i> , 130 S. Ct. 2683 (2010).. . . .	27
<i>Fujitsu, Ltd. v. Federal Express Corp.</i> , 247 F.3d 423 (2d Cir. 2001).. . . .	6
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987).. . . .	23, 24
<i>Hamm v. City of Rock Hill</i> , 379 U.S. 306 (1965).. . . .	19, 21

<i>I.N.S. v. St. Cyr</i> , 533 U.S. 289 (2001).....	18
<i>Massey v. United States</i> , 291 U.S. 608 (1934).....	19, 21
<i>Nachman Corp. v. Pension Ben. Guaranty Corp.</i> , 446 U.S. 359 (1980).....	7
<i>St. Cyr v. I.N.S.</i> , 229 F.3d 406 (2d Cir. 2000).....	7
<i>United States v. Baldwin</i> , No. 09-1725-cr, 2010 WL 4250060 (2d Cir. Oct. 27, 2010).....	11
<i>United States v. Bell</i> , —F.3d —, 2010 WL 4103700 (7th Cir. Oct. 20, 2010). . . . .	11, 15, 18
<i>United States v. Brebner</i> , 951 F.2d 1017 (9th Cir. 1991).....	14
<i>United States v. Brewer</i> , —F.3d —, 2010 WL 4117368 (8th Cir. Oct. 21, 2010). . . . .	11
<i>United States v. Carradine</i> , 621 F.3d 575 (6th Cir. 2010).....	11, 18
<i>United States v. Chambers</i> , 291 U.S. 217 (1934).....	19, 20, 21

<i>United States v. Colon</i> , 220 F.3d 48 (2d Cir. 2000).....	28, 29
<i>United States v. Gomes</i> , 621 F.3d 1343 (11th Cir. 2010) (per curiam).. 11, 16	
<i>United States v. Holley</i> , 818 F.2d 351 (5th Cir. 1987).....	14
<i>United States v. Jacobs</i> , 919 F.2d 10 (3d Cir. 1990).....	6
<i>United States v. Kimbrough</i> , 552 U.S. 85 (2007).....	25, 27
<i>United States v. Klump</i> , 536 F.3d 113 (2d Cir.), <i>cert. denied</i> , 129 S. Ct. 664 (2008).....	10
<i>United States v. Kolter</i> , 849 F.2d 541 (11th Cir. 1988).....	13, 14, 15, 16
<i>United States v. Lewis</i> , —F.3d —, 2010 WL 4262020 (10th Cir. Oct. 29, 2010). . . . .	12
<i>United States v. Payne</i> , 591 F.3d 46 (2d Cir.), <i>cert. denied</i> , No. 09-10015, 2010 WL 1526545 (Oct. 4, 2010). 11	
<i>United States v. Ross</i> , 464 F.2d 376 (2d Cir. 1972).....	8, 9

<i>United States v. Rumney</i> , 979 F.2d 265 (1st Cir. 1992) (per curiam) . . . . .	5, 14
<i>United States v. Samas</i> , 561 F.3d 108 (2d Cir.) (per curiam), <i>cert. denied</i> , 130 S. Ct. 184 (2009) . . . . .	3, 24, 25, 27
<i>United States v. Smith</i> , 354 F.3d 171 (2d Cir. 2003) (per curiam). . . . .	5, 9
<i>United States v. Wilson</i> , No. 10-4160, 2010 WL 4561381 (4th Cir. Nov. 12, 2010) (per curiam). . . . .	12
<i>Warden, Lewisburg Penitentiary v. Marrero</i> , 417 U.S. 653 (1974) . . . . .	<i>passim</i>

## STATUTES

1 U.S.C. § 109. . . . .	<i>passim</i>
18 U.S.C. § 924. . . . .	10
18 U.S.C. § 3583. . . . .	9
21 U.S.C. § 841. . . . .	<i>passim</i>
26 U.S.C. § 7237. . . . .	9

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 10-285**

---

UNITED STATES OF AMERICA,

*Appellant,*

-vs-

JOSHUA ACOFF,

*Defendant-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

---

### **REPLY BRIEF FOR THE UNITED STATES OF AMERICA**

---

#### **Preliminary Statement**

The defendant does not dispute that the district court sentenced him below the 60-month statutory mandatory minimum penalty for his offense. Nor does he offer any basis in the record to justify the district court's decision to disregard the statutorily-mandated penalty. He argues, rather, that the district court's action was justified because (1) after his sentencing, Congress enacted a new law, the Fair Sentencing Act of 2010, that eliminated the mandatory minimum penalty for certain crack cocaine

offenses, and (2) that the old penalty structure violates the equal protection component of the Fifth Amendment. Neither argument justifies his sentence.

As every court of appeals to consider the question has held, the Fair Sentencing Act of 2010, which established new quantity thresholds that trigger mandatory minimum and maximum penalties for cocaine base offenses, only applies to offenses occurring *after* its August 3, 2010 effective date. Acoff committed the offense of conviction on February 14, 2009, and according to the terms of the Savings Statute, 1 U.S.C. § 109, he is subject to the penalties in place at that time. Moreover, those penalties, as this Court has repeatedly held, do not violate the Constitution.

### **Summary of Argument**

I. The Fair Sentencing Act of 2010 (“FSA”) amended the penalty provisions of 21 U.S.C. § 841(b) but contains no express provision that it is to apply retroactively. Accordingly, the general savings statute, codified at 1 U.S.C. §109, requires the application of the penalties in place at the time of the offense.

The defendant’s arguments to the contrary are unavailing. *First*, Acoff argues that the FSA did not alter a penalty provision, but merely changed the categories of people subject to various penalty provisions, but this interpretation is belied by the statute. A plain, common-sense reading of the statute reveals that Congress changed the penalties available for specific crack offenses. *Second*,

Acoff infers from the FSA a congressional intent to apply its terms retroactively, but even if *inferences* were sufficient for a finding of retroactivity – and they are not – the evidence he cites for those inferences does not demonstrate such an intent. *Third*, Acoff argues that the FSA should apply retroactively to avoid treating similarly situated defendants differently. This argument fails to recognize, however, that defendants who committed their offenses under pre-FSA law are not similarly situated to defendants who committed their offenses under the FSA.

II. This Court has entertained and repeatedly rejected equal protection challenges to the crack/powder ratio in the Controlled Substances Act. *See, e.g., United States v. Samas*, 561 F.3d 108 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 184 (2009). The defendant's selective quotation of legislator comments from the debate on the FSA does not undermine this Court's prior cases or establish that the prior penalty regime violated the Constitution.

III. The defendant stipulated in his plea agreement that he was subject to a 60-month mandatory minimum penalty, and he should not be heard to argue to the contrary in this Court.

## **Argument**

**I. The Fair Sentencing Act of 2010 does not apply to cases, such as the defendant's, involving pre-enactment conduct, and therefore, under governing law, the district court was required to impose a sentence of at least 60 months' imprisonment.**

**A. The Savings Statute bars application of the Fair Sentencing Act to conduct occurring before its enactment.**

The Anti-Drug Abuse Act of 1986, 100 Stat. 3207, established a ten-year mandatory minimum sentence for drug offenses involving 50 grams or more of cocaine base, and a five-year mandatory minimum sentence for offenses involving 5 grams or more of cocaine base. 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (2009). After years of debate, Congress recently passed the Fair Sentencing Act of 2010, which was signed by the President on August 3, 2010. The FSA amended § 841(b)(1)(A)(iii) to require 280 grams or more of cocaine base to trigger the ten-year mandatory minimum, and amended § 841(b)(1)(B)(iii) to require 28 grams or more of cocaine base to trigger the five-year mandatory minimum. Pub. L. No. 111-220, 124 Stat. 2372, § 2(a) (August 3, 2010). These new penalties govern crimes committed on or after the August 3, 2010 date when the FSA was signed.

For crimes committed before August 3, 2010, the mandatory penalties for 50 grams and 5 grams of cocaine base set forth at that time in 21 U.S.C. § 841(b)(1)(A)(iii)

and (B)(iii) continue to apply under the general “Savings Statute” or “Savings Clause,” 1 U.S.C. § 109. The Savings Statute provides in pertinent part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. Congress enacted this Savings Statute and its predecessors “to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of all prosecutions . . . .” *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) (internal quotations omitted). The Savings Statute fosters “a Congressional policy of avoiding technical abatements and a determination that one who violates the law should not escape sanction by the mere happenstance that the law was repealed after the criminal act was committed.” *United States v. Rumney*, 979 F.2d 265, 267 (1st Cir. 1992); *United States v. Smith*, 354 F.3d 171, 174 (2d Cir. 2003).

The Savings Statute avoids abatements “not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties.” *Marrero*, 417 U.S. at 660. “Whether the earlier statute has been

amended or repealed outright is of no consequence; the general savings statute applies in either instance.” *Fujitsu, Ltd. v. Federal Express Corp.*, 247 F.3d 423, 432 (2d Cir. 2001); *see also United States v. Jacobs*, 919 F.2d 10, 11-13 (3d Cir. 1990) (savings statute applies to repeals and amendments).

The Savings Statute applies to “save” the pre-existing penalties in § 841(b) for conduct occurring before enactment of the FSA. The FSA modified § 841(b) such that distribution, or possession with intent to distribute, 28 grams of crack cocaine – as opposed to 5 grams of crack cocaine – is now required to trigger a five-year mandatory minimum sentence, and the distribution, or possession with intent to distribute, 280 grams of crack cocaine – as opposed to 50 grams of crack cocaine – is now required to trigger a ten-year mandatory minimum sentence. *See* FSA §§ 2(a)(1) & (2). There is no question that the modified subsections of § 841(b) are penalty provisions, as opposed to substantive provisions, because the statute explicitly states their purposes: “any person who violates subsection (a) of this section shall be sentenced as follows . . . .” 21 U.S.C. § 841(b). In other words, the amended statutory authorization for minimum terms of imprisonment is clearly a “penalty, forfeiture, or liability.” 1 U.S.C. § 109; *Marrero*, 417 U.S. at 661 (“those terms were used by Congress to include all forms of punishment for crime”) (internal quotation omitted).

And although the FSA amends the penalty provisions of § 841, by its own terms, it does not “expressly provide” that it “shall . . . have the effect to release or extinguish

any penalty, forfeiture, or liability incurred under” the prior version of that section. 1 U.S.C. § 109. Congress, of course, is fully aware of how to make a statute retroactive. *See, e.g., Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 382 (1980) (“We have previously noted the care with which Congress approached the problem of retroactivity in ERISA . . . Title IV became effective as soon as ERISA was enacted . . . and indeed was expressly made partially retroactive . . . .”); *St. Cyr v. I.N.S.*, 229 F.3d 406, 416 n.5 (2d Cir. 2000) (explaining that “Congress expressly provided a retroactive temporal reach” for certain provisions of the Illegal Immigration Reform and Immigrant Responsibility Act).

Under the Savings Statute, as well as well-established case law, this ends the inquiry. The Savings Statute requires Congress to “expressly provide” for retroactive application of the ameliorative provisions of the FSA in order to avoid the default rule that it would not apply retroactively. Where, as here, there is no express contrary provision in the act repealing a penalty, the Savings Statute “bar[s] application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense.” *Marrero*, 417 U.S. at 661 (reversing grant of parole to drug offender after repeal of federal drug statute barring parole). Instead, courts must apply the statutory law in force “at the time of the commission of the offense.” *Marrero*, 417 U.S. at 661.

This Court and the Supreme Court have repeatedly applied the Savings Statute to preserve the application of laws that were later repealed or amended, where the new

law contained no express contrary provision. In *United States v. Ross*, 464 F.2d 376 (2d Cir. 1972), for example, this Court considered the application of a new law that eliminated mandatory minimum sentences for certain narcotics offenders and made many of those offenders eligible for parole. The defendant in that case sold heroin in 1968 but was convicted and then sentenced in January 1972, after the effective date of the new law. *Id.* at 377-78. He was sentenced to the mandatory minimum sentence of ten years' imprisonment. *Id.* at 377. He argued that, "since his sentence was imposed after the effective date of the new Act, he was entitled to the benefits of its more liberal sentencing provisions." *Id.* at 378. This Court rejected Ross's claim. Relying in part on the Savings Statute, this Court held that that statute "required the district to sentence Ross pursuant to" the penalty provisions in place on the date of his offense. *Id.* The Court noted that the new law "did not expressly extinguish mandatory minimum sentences" for Ross, as required by the Savings Statute. *Id.*

This Court's reasoning was confirmed by the Supreme Court in its consideration of the same statute at issue in *Ross*. First, the Supreme Court considered "whether a District Judge may impose a sentence [permitted under the new law] where the offender was convicted of a federal narcotics offense that was committed before [the effective date of the act], but where he was sentenced after that date." *Bradley v. United States*, 410 U.S. 605, 606 (1973). Relying largely on the new law's saving clause, the Court found that he could not. *Id.* at 610-11. In *Marrero*, though, the Supreme Court had a chance to consider a similar question directly under the Savings Statute. *Marrero* asked

whether a defendant would be eligible for parole in front of the Board of Parole where he had committed his offense prior to the effective date of the new law, which by its terms had lifted prohibitions on receiving parole. *Marrero*, 417 U.S. at 654-55. After considering the new law's saving clause, the Supreme Court independently analyzed the effect of the Savings Statute. *Id.* at 659-64. In the absence of any express language rendering the new law's "ameliorative criminal sentencing laws" retroactive, the Court set forth the sole issue: "The determinative question is thus whether the prohibition of 26 U.S.C. § 7237(d) against the offender's eligibility for parole . . . is a 'penalty, forfeiture, or liability' saved from release or extinguishment by 1 U.S.C. § 109." *Id.* at 660. The Supreme Court answered that question in the affirmative. *Id.* at 663-64. One of the methods of analysis applied was simple: because a repeal of parole eligibility (the opposite of what the new law did) "would clearly present the serious question under the ex post facto clause . . . of whether it imposed greater or more severe punishment than was prescribed by law at the time of the . . . offense," the creation of parole eligibility was clearly a "'penalty, forfeiture, or liability' saved by § 109." *Id.* (internal quotations omitted).

This Court has continued to apply the lessons learned from *Ross*, *Bradley*, and *Marrero*. In *United States v. Smith*, for example, this Court applied the Savings Statute in the case of an amendment to 18 U.S.C. § 3583(g), which governs the length of a sentence required upon certain violations of supervised release. The defendant sought the more lenient provision in effect as of the time

of his re-sentencing on the violation, rather than the version in effect as of the violation of supervised release. This Court, however, rejected this attempt:

First, relevant Supreme Court and Second Circuit case law supports the Government's contention that it is the law at the time of the offense, including those provisions relating to supervised release, that governs. Second, the federal "saving statute" preserves the original penalties in effect when Smith committed the offense. . . .

*Id.* at 173; *see also id.* at 174 (Supreme Court decisions "clearly state that the date on which the original offense is committed, not the date on which the defendant is sentenced for that offense, determine which version of a statute applies"); *id.* at 175 (holding that Section 109 saves the penalties 'incurred' by the commission of the offense).

This Court more recently applied the Savings Statute in *United States v. Klump*, 536 F.3d 113 (2d Cir.), *cert. denied*, 129 S. Ct. 664 (2008). There, the defendant was convicted of possessing a semiautomatic firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). At the time of his offense, the statute called for a mandatory minimum penalty of ten years' imprisonment; by the time of sentencing, however, the statute had been amended to call for a mandatory minimum sentence of only five years. 536 F.3d at 120. This Court rejected the defendant's claim that he should have been sentenced under the provision in effect at sentencing, relying upon the Savings Statute. *Id.* at 120-21.

In short, the analysis is simple: where an act amending or repealing a prior “penalty, forfeiture, or liability” does not otherwise “expressly provide,” the “penalty, forfeiture, or liability” applicable at the time of the commission of the offense applies to a defendant. It is no surprise, therefore, that this Court (in a summary order) and four other circuit courts of appeal (in published decisions) have held that the statutory penalty provisions amended by the FSA do not benefit those who committed their crimes prior to the enactment of the FSA because there is no “express statement” stating otherwise. *See United States v. Baldwin*, No. 09-1725-cr, 2010 WL 4250060, \*2 (2d Cir. Oct. 27, 2010) (unpublished);<sup>1</sup> *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir. 2010) (holding that because FSA contains no express statement that it is retroactive, court must apply penalty provision in place at time the defendant committed the crime in question); *United States v. Bell*, — F.3d —, 2010 WL 4103700, at \*10-11 (7th Cir. Oct. 20, 2010) (holding that savings statute bars retroactive application of the FSA); *United States v. Brewer*, — F.3d —, 2010 WL 4117368, \*7 n.7 (8th Cir. Oct. 21, 2010);

---

<sup>1</sup> Although summary orders “do not have precedential effect,” 2d Cir. Local R. 32.1.1(a), they still have tremendous resonance in determining the proper application of the law; as this Court has stated: “Denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases.” *United States v. Payne*, 591 F.3d 46, 58 (2d Cir.), *cert. denied*, No. 09-10015, 2010 WL 1526545 (Oct. 4, 2010); *see also* 2d Cir. Local R. 32.1.1(b) (permitting citation to summary orders “issued on or after January 1, 2007”).

*United States v. Gomes*, 621 F.3d 1343, 1345-46 (11th Cir. 2010) (per curiam). See also *United States v. Lewis*, —F.3d —, 2010 WL 4262020, at \*3 (10th Cir. Oct. 29, 2010) (stating in dicta that FSA is not retroactive); *United States v. Wilson*, No. 10-4160, 2010 WL 4561381 (4th Cir. Nov. 12, 2010) (per curiam) (unpublished).

**B. The defendant’s arguments against application of the Savings Statute are unavailing.**

Despite the overwhelming authority supporting application of the Savings Statute to preserve the pre-FSA penalty provisions of § 841 for offenses committed prior to August 3, 2010, the defendant argues that the Savings Statute does not apply in this case. All of his arguments lack merit.

**1. The Fair Sentencing Act altered the penalty structure of 21 U.S.C. § 841(b).**

In order to escape the reach of the Savings Statute, Acoff argues first that his case falls under an exception to the statute. Specifically, he argues that the FSA merely “adjusted the class of persons” who qualify for the mandatory minimum and did not “repeal any penalty.” Def. Br. at 20. Specifically, Acoff claims that Congress differentiated between “serious” and “major” drug traffickers when it imposed the mandatory minimum penalties, and the amendment to the drug quantities is simply a re-classification of what constitutes a “serious” or “major” trafficker. *Id.*

There can be little question, however, that the FSA extinguished one penalty scheme in § 841(b) and replaced it with another. Prior to the enactment of the FSA, individuals – such as Acoff – who were responsible for the distribution, or possession with intent to distribute, of five grams or more – but less than 28 grams – of crack cocaine were liable for a sentence between 5 and 40 years’ imprisonment. Those who so offend now are liable only for a sentence of up to 20 years’ imprisonment, with no mandatory minimums. Similarly, prior to the enactment of the FSA, individuals who were responsible for the distribution, or possession with intent to distribute, of 50 grams or more – but less than 280 grams – of crack cocaine were liable for a sentence between 10 years’ imprisonment and life. Those who so offend now are liable only for a sentence of between 5 and 40 years’ imprisonment. It thus strains credulity for Acoff to argue that the FSA did not change the penalties for the offense with which he was charged.<sup>2</sup> *Cf. Marrero*, 417 U.S. at 664 (holding that a statutory clause addressing the unavailability of parole “is a penalty, forfeiture, or liability” saved by § 109 ”).

The Eleventh Circuit’s decision in *United States v. Kolter*, 849 F.2d 541 (11th Cir. 1988), is not to the contrary. In *Kolter*, the defendant was convicted of being a felon in possession of a firearm. Days before *Kolter*’s

---

<sup>2</sup> Indeed, had Congress amended § 841(b) to *increase* the applicable penalties, there can be little doubt that the defendant would raise *ex post facto* issues about applying the new law to his pre-enactment conduct.

trial was to begin, Congress redefined “convicted felon” to exclude those whose civil rights were restored from the classes of person who could be prosecuted under federal firearm laws. *Id.* at 543. Because Kolter’s civil and political rights had previously been restored, he claimed he could no longer be considered a “convicted felon” under federal firearms law. *Id.* at 542-43. Kolter moved to dismiss the indictment claiming that the amended definition of “convicted felon” should apply retroactively. *Id.* at 543. The district court denied the motion, but on appeal, the Eleventh Circuit reversed Kolter’s conviction. The *Kolter* court held that the Savings Statute did not apply because the revised definition of “convicted felon” did not affect the punishment provided but merely altered the class of persons for whom the specified conduct was prohibited. *Id.* at 544. *Kolter* reasoned that the Savings Statute did not apply because Congress did not “repeal a statute,” rather it changed the “definition” of a “convicted felon.”<sup>3</sup> *Id.*

*Kolter* is factually dissimilar in that the FSA expressly amended the “penalty” portion of 21 U.S.C. § 841,

---

<sup>3</sup> *Kolter* stands alone in its determination that the amended definition of “convicted felon” had retroactive application. The First, Fifth, Eighth and Ninth Circuits all concluded differently and held that when Congress amended the definition of convicted felon it did not have retroactive application to cases pending at the time of the amendment. *See, e.g., Rumney*, 979 F.2d at 267; *United States v. Holley*, 818 F.2d 351, 353 (5th Cir. 1987); *Davis v. United States*, 972 F.2d 227, 230 (8th Cir. 1992); *United States v. Brebner*, 951 F.2d 1017, 1022-23 (9th Cir. 1991).

whereas in *Kolter*, Congress amended the definition of “convicted felon,” a change which the Eleventh Circuit concluded “did not affect the punishment provided.” 849 F.2d at 544. Moreover, as noted by the Seventh Circuit when it rejected this precise argument just last month, unlike in *Kolter*, the FSA did not redefine the groups targeted by the mandatory minimum sentences:

[T]he terms “serious” and “major” drug traffickers do not appear in either the preexisting or FSA-amended versions of 21 U.S.C. § 841. They were employed by the House as part of its findings relating to the initial version of the Fair Sentencing Act it passed, *see* Drug Sentencing Reform & Cocaine Kingpin Trafficking Act of 2009, H.R. 265, 111th Cong. § 2(3), (4) (2009), but their absence from the enacted version of the bill, coupled with *Kolter*’s emphasis on statutory redefinition, renders [the defendant’s] argument unavailing.

*Bell*, No. 09-3908, 2010 WL 4103700, \*10. By omitting the terms of classification, it is evident that Congress linked the mandatory minimum penalties to quantities, not groups. In amending the quantities, the FSA had the primary effect of removing an existing *punishment*, not redefining a class of persons. Specifically, it removed a mandatory minimum sentence for those who possessed more than 5 grams of crack cocaine, but less than 28 grams. Therefore, the FSA extinguished a penalty and thus is saved by the operation of § 109.

Finally, although Acoff relies on *Kolter* to support his argument against application of the Savings Statute, it bears noting that the Eleventh Circuit itself apparently saw no inconsistency between *Kolter* and the application of the Savings Statute to the FSA. Just last month, that court held that the Savings Statute bars application of the FSA to cases involving conduct that pre-dated its enactment. *Gomes*, 621 F.3d at 1346 (“Moreover, because the FSA took effect in August 2010, after appellant committed his crimes, 1 U.S.C. § 109 bars the Act from affecting his punishment.”).

## **2. Application of the Savings Statute does not frustrate congressional intent.**

Next, Acoff argues that the application of the Savings Statute defeats the purpose of and congressional intent of the FSA. Def. Br. at 22. Because the FSA is silent on the retroactive application of the statute, Acoff argues, the Court must look to congressional intent, *id.* at 23, and when he looks at congressional intent, he infers an intent to apply the new penalty provisions retroactively. *Id.* at 23-24. Relatedly, he argues that in light of this congressional “intent,” the Savings Statute should not be applied to continue application of a punishment scheme that no longer serves any purpose. *Id.* at 24-25.

Acoff’s argument is mis-directed, however, because there is no reason to “infer” congressional intent. To allow an “inference” of congressional intent would render the Savings Statute, which requires that “the repealing Act . . . *expressly provide*” that it is retroactive, a nullity. *See* 1 U.S.C. § 109 (emphasis added). And given this background, Congress’s intent is clear when it opted not to expressly provide for retroactive application when it could have easily done so. Acoff points to the overwhelming congressional bi-partisan support for its passage and the title (“Fair Sentencing Act”) of the act to support his theory. But this argument ignores the political process of compromise, and instead begs this Court to unnecessarily look beyond the plain language of the statute. If congressional intent was so “clear” as Acoff suggests, it could have been plainly expressed in the enacted statute. “Congress has the power to enact laws with retrospective effect,” but a “statute may not be applied retroactively . . .

absent a clear indication from Congress that it intended such a result.” *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). Despite this ground swell of support, as Acoff characterizes the congressional environment, no mention is made in the FSA of retroactive application.<sup>4</sup> There is no need to “infer” its intent when Congress is presumed to know the law, *see Cannon v. University of Chicago*, 441 U.S. 677, 696-699 (1979), and its omission of clear legislative language to the contrary, evidences its intention not to apply the FSA retrospectively. *See also Bell*, 2010 WL 4103700, \*11 (“[T]he FSA does not contain so much as a hint that Congress intended it to apply retroactively.”); *Carradine*, 621 F.3d at 580 (“The new law at issue here, the Fair Sentencing Act of 2010, contains no express

---

<sup>4</sup> Even though the statute does not provide for retroactive effect, there is evidence that the question of retroactivity was an issue of open and unresolved debate. *See, e.g.*, Restoring Fairness to Federal Sentencing Hearing at 11 (Deputy Attorney General Lanny Breuer stating “Whether at the end of the day the issue of retroactivity is one that should be adopted, I am sure that will be a topic that will be discussed.”), 12 (United States District Judges Reggie Walton and Ricardo H. Hinojosa discussing the effects of prior retroactivity of the crack Guidelines), 19 (Senator Dianne Feinstein stating her belief that the legislature should consider making the statute retroactive), 20-21 (Senator Amy Klobuchar discussing certain difficulties with retroactive application), 21 (Judge Walton noting that, “if retroactivity is a reality,” Congress may have to provide additional funding to the courts), 22 (Senator Klobuchar stating “that we are going to move very carefully as we look at any talk of retroactivity”).

statement that it is retroactive nor can we infer any such express intent from its plain language.”).

Moreover, the fact that Congress directed the Sentencing Commission to revise the Sentencing Guidelines applicable to crack cocaine offenses within 90 days, *see* FSA § 8, does not demonstrate an express congressional intent to apply the FSA retroactively. The more likely explanation for this provision was to ensure that the Guidelines were revised to reflect the new penalty scheme. After all, the Guidelines for crack cocaine were keyed to the prior law’s 100:1 crack-to-powder ratio, and thus by directing the Sentencing Commission to revise the Guidelines quickly, Congress expressed its intent to have the Guidelines conform, relatively quickly, to the FSA’s new 18:1 ratio.

Acoff’s reliance on *Hamm v. City of Rock Hill*, 379 U.S. 306 (1965), *United States v. Chambers*, 291 U.S. 217 (1934) and *Massey v. United States*, 291 U.S. 608 (1934), does not advance his cause. Acoff maintains that to deny retroactivity of the FSA would violate the principle “impute[d] to Congress [of] an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive.” Def. Br. at 25 (quoting *Hamm*, 379 U.S. at 313). Each of the cited cases arise from distinctly different circumstances, and none pertain to congressional action to repeal or amend a penalty or punishment provision in a criminal law.

*Chambers* and *Massey* involved the prosecution of two defendants for violation of the National Prohibition Act

(“NPA”). The ratification of the Twenty-First Amendment, however, repealed the Eighteenth Amendment – which empowered Congress to pass the NPA – and rendered the NPA “inoperative.” *Chambers*, 291 U.S. at 222. Once the Twenty-First Amendment was ratified “[n]either the Congress nor the courts could give [the NPA] continued vitality.” *Id.* In an attempt to preserve the prosecution of *Chambers* and *Massey*, the government argued for the application of the Savings Statute. The Supreme Court held that the Savings Statute did not apply:

The National Prohibition Act was not repealed by act of Congress, but was rendered inoperative, so far as authority to enact its provisions was derived by the Eighteenth Amendment, by the repeal, not by the Congress but by the people, of that amendment.

291 U.S. at 224. In other words, as the authority of Congress to enact the NPA was conferred by the people by constitutional amendment, the repeal of that authority rendered the Act unenforceable. *Id.* *Chambers* concluded that the Savings Statute “applies and could only apply, to the repeal of statutes by the Congress and to the exercise by the Congress of its undoubted authority to qualify its repeal and thus to keep in force its own enactments.” *Id.* Section 841 and the FSA, of course, were not enacted under authority conferred by constitutional amendment, but rather were an exercise of Congress’s legislative authority to “qualify its repeal” of certain mandatory penalties.

*Hamm* is similarly distinguishable from the changes affected by the FSA. *Hamm* involved the prosecution of several individuals in South Carolina and Arkansas for their sit-in protests of racial discrimination in certain public accommodations. 379 U.S. at 307-308. After the protestors were convicted under State trespass laws, they appealed, but their convictions were affirmed. Sometime after their convictions, while the cases were on appeal, the Civil Rights Act of 1964 was passed, which forbade discrimination in places of public accommodation and removed “peaceful attempts to be served on an equal basis” as a punishable activity. *Id.* at 308. *Hamm* held that the convictions abated and that the Savings Statute did not nullify the abatement. *Id.* at 314. Relying on *Chambers*, “a case where the cause for punishment was removed by a repeal of the constitutional basis for the punitive statute,” the Supreme Court reasoned that the Civil Rights Act did not involve a “technical abatement,” but rather the Act “substitute[d] a right for a crime.” *Id.* “So drastic a change is well beyond the narrow language” of the Savings Statute. *Id.*

Each of the cases relied upon by Acoff are unique in their application and markedly different from the changes in penalties promulgated by the FSA. In all these cases, the Savings Statute was determined not to apply because the authority of the federal government (*Chambers* and *Massey*) and the state government (*Hamm*) was effectively nullified, either by constitutional amendment, as in *Chambers* and *Massey*, or by substituting a right for a crime, as in *Hamm*. Here, by contrast, the FSA did not work a drastic change like the Civil Rights Act’s substitution of a right for a crime. It did not invalidate the

basis for conviction under the Controlled Substances Act. Indeed, the exact same conduct is still illegal – only the available penalties have been altered. In other words, the FSA is merely an “ameliorative criminal sentencing law” that repeals a harsher one in force at the time of the commission of an offense.” *See Marrero*, 417 U.S. at 660-61.

**3. There are no constitutional concerns with continued application of the pre-existing penalties that would require narrow construction of the Savings Statute.**

Finally, Acoff argues that the Savings Statute must be narrowly construed to avoid conflicting with the equal protection component of the Fifth Amendment’s Due Process Clause. Def. Br. at 26. At the core of his argument is his invocation of the principle that similarly situated defendants should be treated similarly. *Id.*

As a preliminary matter, defendants who committed crack distribution offenses prior to the enactment of the FSA are not similarly situated to defendants who committed the same offenses after enactment of the FSA, because the defendants committed their offense under different laws. An individual who sold, for example, 50 grams of crack prior to August 3, 2010, was on notice that the punishment for such distribution included a mandatory minimum sentence of 10 years under 21 U.S.C. § 841(b)(1)(A). The individual undertook the criminal conduct with the known, established, codified risk that the conduct carried the consequence of a mandatory minimum

sentence of ten years under the law. Another individual, on the other hand, who sold 50 grams of crack after August 3, 2010, did so under a different law, and was on notice that the punishment for such distribution included a mandatory minimum of five years. Here, the defendant is charged with a crack distribution offense committed prior to the enactment of the FSA, in violation of the law in place at the time of the conduct, and therefore is not similarly situated to individuals who committed crack distribution offenses at a later date, under a different law. Distinguishing between the defendants and later offenders does not frustrate the legislative purpose of the FSA. Rather, it is necessary to carry out Congress's intention that the law in place at the time of the crack distribution offense apply to the criminal conduct.

Acoff relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987), in support of his argument that similarly situated defendants should be treated similarly, but that case does not help him. *Griffith* followed the Supreme Court's ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986), and decided whether *Batson* applied retroactively to cases not yet final. *Griffith*, 479 U.S. at 316. *Batson*, of course, proscribed the use of peremptory challenges to strike or remove prospective jurors on account of their race. *Id.* In *Griffith*, the Supreme Court concluded that *Batson* had retroactive application to all cases not yet final. *See id.* at 328.

*Griffith* is readily distinguishable. *Griffith* was limited to the issue of the "retroactivity of new constitutional rules of criminal procedure." *Id.* at 320. The Savings Statute, by comparison, was enacted to "to abolish the common-law presumption that the repeal of a criminal statute resulted in

the abatement of all prosecutions which had not reached final disposition in the highest court authorized to review them.” *Marrero*, 417 U.S. at 660 (internal citations and quotations omitted). The Savings Statute’s application pertains to legislative action, such as the enactment of the FSA, and not to constitutional changes in the rules of criminal procedure. Here, the FSA does not mandate any new procedures, nor does it mark any constitutional change. Accordingly, *Griffith* neither requires, nor even suggests, that this Court infer retroactive application of the FSA.

**II. The crack to powder disparity under 21 U.S.C. § 841(b) does not violate principles of equal protection.**

Acoff argues that the crack-powder ratio embodied in the pre-FSA penalty structure violates the equal protection component of the Fifth Amendment. Def. Br. at 13-16. This Court rejected this precise argument just last year in *United States v. Samas*, 561 F.3d 108 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 184 (2009), a case about which Acoff’s brief is conspicuously silent. Nevertheless, Acoff presents no reason to revisit the issue now.

The defendant argues that the passage of the FSA constitutes a legislative confirmation that the 1986 sentencing scheme violated the equal protection component of the Fifth Amendment and therefore “the penalties in the 1986 sentencing act . . . serve no legitimate purpose after the adoption of the Fair Sentencing Act.” Def. Br. at 16. The defendant’s theory is misguided because *Samas* controls and a legislative amendment to the

sentencing statute is not an admission that the prior statute violated the Constitution.

While *Samas* was decided before the FSA was enacted, it was decided after the United States Sentencing Commission adopted an across the board retroactive reduction of the offense levels for crack cocaine and in the midst of the escalating dispute over the crack-powder disparity. Indeed, *Samas* was decided after the Supreme Court held that sentencing courts after *United States v. Booker*, 543 U.S. 220 (2005) are not required to “adhere to the 100-to-1 ratio for crack cocaine quantities other than those that trigger the statutory mandatory minimum sentences.” *United States v. Kimbrough*, 552 U.S. 85, 104-105 (2007).

Notwithstanding this climate of discontent over the crack-powder ratio, this Court held that the mandatory sentencing scheme in the narcotics sentencing statute, § 841(b), is not unconstitutional. 561 F.3d at 110. In so doing, this Court noted that it has “repeatedly rejected” such arguments in the past. *Id.* (citing cases). Moreover, the Court rejected the suggestion that recent developments – including *Kimbrough* – had undermined the constitutional validity of the statutory crack-powder ratio: “Nothing in *Kimbrough* suggests that the powder to crack cocaine disparity in § 841(b) is unconstitutional.” *Id.*

Indeed, although Acoff contends that there is no rational basis to treat crack and powder offenses differently, as the *Kimbrough* Court noted, even the Sentencing Commission in its reports had not urged the “identical treatment of crack and powder cocaine.” 552

U.S. at 98. The Commission found that “some differential in the quantity-based penalties for the two drugs is warranted, because crack is more addictive than powder, crack offenses are more likely to involve weapons or bodily injury, and crack distribution is associated with higher levels of crime.” *Id.* (quoting U.S.S.C., *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002) (“2002 Report”), pp 93-94, 101-102). Moreover, in 2007, the Sentencing Commission again concluded that quantifiable differences exist between crack and powder cocaine offenses. Specifically, after substantial study, the Sentencing Commission found in 2002, and again in 2007, that “[s]moking crack cocaine produces quicker onset of, shorter-lasting, and more intense effects than snorting powder cocaine,” which “result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter ‘highs’ and develop an addiction.” 2002 Report at v, 19, 93-94; U.S.S.C., *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007) (“2007 Report”), pp 6-7, 63-67.<sup>5</sup> The Commission also found that weapons involvement and bodily injury “occur more often in [crack] cases than in powder cocaine cases,” and that crack trafficking “is associated with somewhat greater levels of systemic crime.” 2002 Report at 52-54, 57, 100-02; 2007 Report at 11, 14, 31-34, 36-38, 86 & n.129. In short, the Sentencing Commission has identified rational and reasonable bases for treating crack and powder differently.

---

5

*Available at*

[http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

Acoff disagrees, and in support he carefully selects comments by legislators during the debate on the FSA regarding their general opinion about the 100:1 ratio. He fails to cite other comments by legislators who favored continuation of that ratio, however. *See, e.g.*, 156 Cong. Rec. H6197-98, H6203 (daily ed. July 28, 2010) (statement of Representative Lamar Smith indicating a desire not to adjust the crack/powder ratio at all). This type of disagreement is part of the legislative process which exists in virtually every congressional action, and here, the disagreement resulted in a bill that one legislator termed a “fair compromise.” *See* 156 Cong. Rec. H6188 (daily ed. July 28, 2010) (statement of Representative James Sensenbrenner). It is not, as Acoff suggests, a *de facto* admission that the previous law violated the Constitution.

As the Supreme Court noted in *Kimbrough*, it is up to Congress whether to change the statutory mandatory minimums, 552 U.S. at 100, and also whether to make those changes retroactive. As set forth above, Congress decided not to make its statutory change retroactive. “[H]owever severe the consequences for respondent, Congress trespassed no constitutional limits” by not making its amendment of this drug statute retroactive. *See Marrero*, 417 U.S. at 664; *Dillon v. United States*, 130 S.Ct. 2683, 2692 (2010) (there is “no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments” reducing crack penalties).

*Samas* remains controlling precedent here and the mere legislative amendment to the sentencing scheme

cannot be viewed as proof of a constitutional violation. Accordingly, a reversal of the sentence imposed by the district court is mandated with directions to impose a sentence of at least 60 months of imprisonment.

**III. Acoff waived his right to seek to enforce a sentence outside the agreed upon range.**

Acoff does not contest that he signed a written plea agreement that unambiguously acknowledged the applicability of the 60-month mandatory minimum penalty and repeatedly confirmed in open court his understanding that he faced that penalty. He argues only that his plea agreement authorized him to support the district court's *sua sponte* decision to disregard governing law, and in support of this principle, relies on *United States v. Colon*, 220 F.3d 48, 51 (2d Cir. 2000).

*Colon* is distinguishable, however. In that case, the parties had stipulated to a guidelines range that included a reduction in his offense level by three levels for his minor role in the offense. *Id.* at 50. The probation office determined that the defendant was ineligible for the three-level reduction; at sentencing, the defendant objected to this conclusion while the government relied on the stipulation in its plea agreement. *Id.* The district court adopted the probation department's position and the defendant appealed. *Id.* On appeal, the government stated that while it continued to believe that the facts warranted a minor role adjustment, it also believed the district court's judgment was supported by the facts and the law and hence defended that judgment on appeal. *Id.* at 51.

Here, by contrast, the defendant has not made any attempt to abide by his stipulation in the plea agreement that he was subject to a mandatory minimum of 60 months' imprisonment. Specifically, unlike the government in *Colon*, the defendant does not argue that his stipulation was correct *and* that the district court's decision was legally justifiable. He argues – as he did in the district court at sentencing – that the district court was free to sentence below the mandatory minimum in direct contravention of his stipulation in the plea agreement. *See* JA 66, 82-84.

### **Conclusion**

Accordingly, the government respectfully requests that this Court reverse the 15-month sentence imposed by the district court, and remand for imposition of a sentence at or above the 60-month minimum established by 21 U.S.C. § 841(b)(1)(B)(iii) (2009).

Dated: November 18, 2010

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY

A handwritten signature in black ink, appearing to read "B. Leaming", with a long horizontal stroke extending to the right.

BRIAN P. LEAMING  
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER  
Assistant United States Attorney (of counsel)

**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing reply brief complies with the 7,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the reply brief is calculated by the word processing program to contain approximately, 6,992 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "B. Leaming", with a long horizontal stroke extending to the right.

BRIAN P. LEAMING  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

**1 U.S.C. § 109. Repeal of statutes as affecting existing liabilities**

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.